IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs,* v. STATE OF TEXAS, *et al.*, *Defendants.*	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' REPLY IN SUPPORT OF THE INADMISSIBILITY OF EXPERT REPORTS

Expert reports are out-of-court statements offered for the truth of the matters asserted and are therefore inadmissible hearsay. Without disputing that hornbook law, Plaintiffs seek to invoke the residual exception to the rule against hearsay. They cite a single district court case from California in which an expert witness quit so late in the proceeding that the offering party could not reasonably find an alternative expert. That is consistent with the intent behind the residual exception, which is to be used very rarely and only in exceptional circumstances. The residual exception requires that the offered evidence is more probative than any other the proponent could otherwise reasonable obtain. Cases on point hold that expert reports are not more probative than live testimony, and all parties in this case have had a reasonable opportunity to obtain live testimony. So the residual exception to the rule against hearsay does not apply.

ARGUMENT AND AUTHORITIES

Plaintiffs do not dispute that expert reports are inadmissible hearsay under Federal Rule of Evidence 802. *See*, *e.g.*, *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994); *Mahnke v. Wash. Metro. Area Transit Auth.*, 821 F. Supp. 2d 125, 154 (D.D.C. 2011) (holding that absent a stipulation, "both the expert reports and CVs are inadmissible as hearsay"); *Wilson v. Hartford Ins. Co. of the Midwest*, No. 10–993, 2011 WL 2670199, at *3 (W.D. Wash. Oct. 20, 2011) ("The court notes that parties often, for ease of presentation of evidence, mutually agree that expert reports are admissible. The court will not, however, force parties to reach such an agreement."); *Alexie v. U.S.*, No. 3:05-cv-00297, 2009 WL 160353, at *1 (D. Alaska Jan. 21, 2009) ("Application of the hearsay rule to exclude both parties' experts reports is quite straightforward. The reports are out-of-court statements by witnesses offered for their truth and so fall within the definition of hearsay in [Federal Rule of Evidence] 801.").

Rather, Plaintiffs seek to offer the expert reports under the residual exception to the rule against hearsay, Federal Rule of Evidence 807. "Congress intended the residual exception to be used only in rare circumstances." *Cook v. Miss. Dep't of Hum. Servs.*, 108 F. App'x 852, 856 (5th Cir. 2004); *see also Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979) (holding that the residual exception "will be used very rarely, and only in exceptional circumstances"). Allowing a blanket use of Rule 807 without sufficient exceptional circumstances—such as Plaintiffs propose—would swallow the general rule against out-of-court statements offered to prove the truth of the matters asserted. *See*

U.S. v. Love, 592 F.2d 1022, 1026 (8th Cir. 1979) ("The history of [the residual exceptions] indicates that Congress did not intend to create a broad new hearsay exception."). Consistent with Congress's intent that the residual exception rarely be available, Rule 807 requires that the evidence offered be "more probative" than any other that the party could have obtained through reasonable efforts. Fed. R. Evid. 807(a)(3). And admitting the hearsay must "serve the purposes of these rules and the interests of justice." Fed. R. Evid. 807(a)(4); *U.S. v. Mathis*, 559 F.2d 294, 299 (5th Cir.) ("[T]ight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules.").

In the one case that they cite, Plaintiffs gloss over the facts that show such exceptional circumstances. *Televisa, S.A. de C.V. v. Univision Commc'ns, Inc.*, 635 F. Supp. 2d 1106 (C.D. Cal. 2009). The U.S. District Court for the Central District of California did admit an expert report over a hearsay objection. *Id.* Yet Plaintiffs omit the operative facts that justified the rare use of Rule 807. After producing a report and being deposed, the expert witness moved to a new employer. *Id.* at 1107. The new employer initially agreed to the expert's continued work on the case despite a potential conflict with one of the employer's clients. *Id.* Then, the new employer changed course based on pressure from the client's CEO (i.e., the party in the litigation opposed to the party who had retained the expert witness). *Id.* At that "late stage in the game," the expert report was more probative than any other evidence that the party could procure through reasonable efforts. *Id.* at 1110.

Here, Plaintiffs present no exceptional circumstances, nor could they. All of the parties have had a reasonable opportunity to procure expert witnesses to testify live at trial. As one court held in specifically distinguishing *Televisa*, "most importantly, Defendant's experts are available and intend to testify at trial." *U.S. v. Lasley*, No. 14-CR-45-LRR, 2014 WL 6775539, at *6 (N.D. Iowa Dec. 2, 2014). Therefore, the court found that the proponent of the expert report did not satisfy Rule 807(a)(3) because "the experts' testimony itself is more probative on the point for which such experts' reports are offered." *Id.*; *Alexie*, 2009 WL 160353, at *1 ("[S]uch reports cannot meet the requirement of [Federal Rule of Evidence 807] because the expert's live direct testimony is at least equally probative."); *see also Mathis*, 559 F.2d at 229 ("[The residual exception], thus, has a built-in requirement of necessity. . . . [O]ur common law heritage has always favored the presentation of live testimony over the presentation of hearsay testimony by the out-of-court declarant."). Oddly, Plaintiffs point to Defendants' ability to cross examine their experts live as support for the use of Rule 807, but that undermines their argument. If Defendants can examine the witnesses live, so can Plaintiffs. Because live testimony is more probative than written reports (or at least equally so), Plaintiffs cannot satisfy the third requirement of Rule 807—let alone prove the exceptional circumstances that justify the rare use of the residual exception to the rule against hearsay.

Date: June 29, 2017

Respectfully submitted.

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